82-1239

No.

IN THE SUPREME COURT UNITED STATES OF AMERICA

October Term 1982

GARY WAYNE DENEEN,
Petitioner,

-vs-

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW.

Was there a violation of a plea agreement entitling Petitioner to be resentenced where the Prosecution as part of the plea agreement promised that the Government would take no position regarding sentence, but at a hearing on Petitioner's Motion to Reduce Sentence, took a position requesting that the Court not disturb the nine (9) year sentence previously imposed on Petitioner.

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NOW COMES Petitioner, GARY WAYNE DENEEN, by his attorney, Edward Wishnow, and petitions that this Court issue a Writ of Certiorari to review the judgment entered by the United States Court of Appeals for the Sixth Circuit, and in support thereof says:

1. QUESTIONS PRESENTED FOR REVIEW.

Was there a violation of a plea agreement entitling Petitioner to be resentenced where the Prosecution as part of the plea agreement promised that the Government would take no position regarding sentence, but at a hearing on Petitioner's Motion to Reduce Sentence, took a position requesting that the Court not disturb the nine (9) year sentence previously imposed on Petitioner.

2. REPORTS OF OPINIONS DELIVERED IN THE COURT'S BELOW.

The United States Court of Appeals for the Sixth Circuit in its Order dated September 17, 1982 (Hoffman[1], Senior

[1]Hon. Walter E. Hoffman, Senior Judge, United States District Court for the Eastern District of Virginia sitting by designation.

District Judge, concurring specially) affirmed the judgment of the District Court in denying Petitioner's Motion for Reduction of Sentence.

3. JURISDICTIONAL GROUNDS.

The Order sought to be reviewed is an Order of the United States Court of Appeals for the Sixth Circuit dated September 17, 1982, which affirmed a Judgment of the District Court.[2] Petitioner had taken a direct appeal to the Court of Appeals from a denial of his Motion for Reduction of Sentence brought pursuant to Federal Rules of Criminal Procedure 35.

On November 18, 1982, the Court of Appeals by its Order denied Petitioner's Petition for Rehearing Pursuant to Federal Rules of Appellate Procedure 40 and, in the Alternative, Suggestion for En Banc Determination Pursuant to Federal Rule of Appellate Procedure 35.

The jurisdiction of this Court is involked pursuant to 28 USC 1254(1).

4. COURT RULES INVOLVED.

Petitioner's Motion for Reduction of Sentence brought in the trial court was pursuant to Federal Rule of Criminal Procedure 35(b) which provides in pertinent that:

> "The court may reduce a sentence within 120 days after the sentence is imposed, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction. The court may also reduce a sentence upon revocation of probation as provided by law. Changing a sentence from a sentence of

[2] Wendell A. Miles, United States District Judge for the Western District of Michigan.

incarceration to a grant of probation shall constitute a permissible reduction of sentence under this subdivision."

Petitioner's initial criminal case was disposed of in the trial court pursuant to a plea agreement taken in conformity with Federal Rule of Criminal Procedure 11(e) which provides in pertinent part:

> (1) In General. The attorney for the Government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will do any of the following:
>
> (A) move for dismissal of other charges; or
>
> (B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or
>
> (C) agree that a specific sentence is the appropriate disposition of the case.
>
> The court shall not participate in any such discussions.

5. STATEMENT OF THE CASE.

Petitioner, GARY WAYNE DENEEN, was charged in a seventeen (17) count indictment in the Western District of Michigan with mail fraud in violation of 18 U.S.C. 1341, interstate transportation of stolen money and securities in violation of 18 U.S.C. 2314, and interstate transportation of falsely made, forged, altered or counterfeit securities in violation of 18 U.S.C. 2314. He was also charged in the Eastern District of Wisconsin in a four (4) count indictment with interstate transportation of falsely made, forged, altered or counterfeit securities. The Wisconsin case was

transferred to the Western District of Michigan pursuant to Federal Rules of Criminal Procedure 20.

The gist of the indictments were that DENEEN overfinanced the purchase of tow trucks by inflating the purchase price of the trucks and attached towing equipment through the use of fraudulent documents.

DENEEN ultimately pled guilty to one (1) count each of mail fraud, interstate transportation of stolen money and securities, and interstate transportation of falsely made, forged, altered or counterfeit securities. In exchange for the guilty plea, the Government agree to dismiss the remaining counts of the two (2) indictments and to take no position regarding the sentence to be imposed.[3]

At the sentencing date, but prior to imposition of the sentence, the Government again reiterated that the plea agreement involved the Government taking no position.[4] The District Court sentenced DENEEN to concurrent terms on the three (3) counts of five (5) years, nine (9) years, and nine (9) years respectively.

Within a few days of sentencing, DENEEN moved pursuant to Federal Rules of Criminal Procedure 35 for a reduction of sentence.

At the Rule 35 hearing, the Government submitted a written Memorandum in Opposition to Motion for Sentence Reduction. At the Rule 35 hearing, the Prosecutor further stated that DENEEN had freely lied, cheated and stole and

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[3] September 25, 1981, plea transcript page 7, by Martin Palus, Assistant United States Attorney: "It's also a part of the plea agreement as we understand it, your Honor, that the Government has agreed that it will take no position regarding the sentence to be imposed by the Court upon Mr. Deneen."

[4] November 9, 1981, sentence transcript, page 6, by Martin Palus, Assistant United States Attorney "It was part of the plea agreement that the Government would make no comment or recommendation regarding sentence."

that the Court had shown mercy in originally sentencing him and that the original sentence should remain.[5]

The Court in ruling against DENEEN'S Motion for Reduction in Sentence appeared to place great reliance on the Prosecutor's comments.[6] On December 7, 1981, the trial court entered an Order denying the reduction of sentence. DENEEN took a direct appeal from this Order to the United States Court of Appeals for the Sixth Circuit.

On September 17, 1982, the Court of Appeals by its Order affirmed the District Court's denial of a reduction of sentence. On September 25, 1982, DENEEN filed a Petition for Rehearing pursuant to Federal Rule of Appellate Procedure 40 and, in the Alternative, Suggestion for En Banc Determination Pursuant to Federal Rules of Appellate Procedure 35. The Court of Appeals pursuant to its Order dated November 18, 1982, denied DENEEN'S petition. This proceeding is a Petition for Writ of Certiorari to United States Court of Appeals for the Sixth Circuit.

6. ARGUMENT.

It is widely acknowledged that the vast majority of federal criminal cases are disposed of by way of guilty pleas at the trial court level.[7] The question presented for review by this Petition is an important question of Federal law which has not been, but should be, settled by this Court as plea bargaining and sentencing procedures occur in the majority of criminal cases brought in the United States

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[5] November 27, 1981, hearing transcript pages 74, 75 and 76.

[6] November 27, 1981, hearing transcript page 85, Hon. Wendell A. Miles, "The United States Attorney has put his finger on it . . ."

[7] In 1964, guilty pleas accounted for 90.2% of all criminal convictions in United States district courts. Ibid. In fiscal 1970, of 28,178 convictions in the 89 United States district courts, 24,111 were by pleas of guilty or nolo contendere. Report of Director of Administrative Office of U.S. Courts, for Period July 1 through Dec. 31, 1980, Table D-4, p. A-26. *Santobello* v. *New York* 404 US 257, 30 L Ed 2d 427, 92 S Ct 495 (1971), (Douglas, J., concurring) at 263 n.1.

District Courts and the issue here presented is thusly significant and applicable to general federal criminal jurisprudence. Intertwined with this question is whether the question presented for review in this Petition conflicts with the decision of this Court in *Santobello* v. *New York*, 404 US 257, 30 L Ed 2d 427, 92 S Ct 495 (1971).

Certiorari should also be granted in this case because the decision of the Court of Appeals for the Sixth Circuit is in conflict with a decision of the Court of Appeals for the Fifth Circuit in *United States* v. *Ewing*, 480 F.2d 1141 (CA 5, 1973).

The focal point for an analysis of the impotance of the question presented for review in this Petition must be the *Santobello case, supra.* In *Santobello*, the petitioner pled guilty to a gambling offense. The Prosecutor agreed to make no recommendation as to the sentence. On the date set for sentencing, a new Prosecutor appeared and recommended the maximum one (1) year sentence. Over the defendant's objection that this was a violation of the Prosecution's promise, the Judge, nevertheless, sentenced the petitioner, indicating that he would not take into consideration what the Prosecutor said.

Prefatory to its holding, this Court commented on the importance of guilty pleas in the administration of justice when it stated:

> "The disposition of criminal charges by agreement between the Prosecutor and the accused, sometimes loosely called 'plea bargaining', is an essential component of the administration of justice. Properly administered, it is to be encouraged." at 260.

This Court held that "when a plea rests in any significant degree on a promise or agreement of the Prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." at 262. This Court remanded the case back to the state court for a determination as to whether there should be specific performance of

the agreement on the plea, in which case the petitioner should be resentenced by a different Judge or whether petitioner should be given the opportunity to withdraw his guilty plea.

Here, the Government by stating that it would take no position regarding sentence made a stronger, more binding and more enforceable promise then in *Santobello*, where the prosecution had promised to make no recommendation as to sentence. The appellate courts that have considered the applicability of *Santobello* to this distinction in promises made by the Prosecution, are uniform in holding that the promise of taking no position is fully enforceable against the Government notwithstanding the consequences. *United States* v. *Crusco*, 536 F.2d 21 (CA 3 1976), *United States* v. *Cook*, 668 F.2d 317 (CA 7 1982); Cf. *United States* v. *Miller*, 565 F.2d 1273 (CA 3 1977) and *United States* v. *Avery*, 621 F.2d 214 (CA 5 1980).

It is indisputable that had the Prosecutor in the instant case made his comments at Petitioner's sentencing, there would have been a breach of the plea agreement and DENEEN would be entitled to relief. The question presented by this Petition is whether there exists a breach of a plea agreement when the Prosecutor speaks out contrary to his agreement not to take a position at sentencing, not at the original sentencing, but at a motion to reduce sentence pursuant to Federal Rules of Criminal Procedure 35.

In the *Ewing case, supra*, the Court of Appeals for the Fifth Circuit found a violation of a plea agreement where the Government, although fulfilling its promise not to oppose probation at sentencing, opposed probation at a Rule 35 motion for reduction of sentence. Ewing had pled guilty to two (2) counts of aiding and abetting the interstate transportation of stolen motor vehicles in return for the Government's promise to dismiss the remaining three (3) counts of the indictment and not oppose a probation sentence. The court sentenced Ewing to four (4) years and three (3) years

on the two (2) counts, the sentences to run consecutively. Ewing then filed a motion for reduction of sentence pursuant to Rule 35 of the Federal Rules of Criminal Procedure. At the Rule 35 hearing, the Government was represented by a different prosecutor who opposed Ewing's request for probation. The trial court stated that it would not be influenced by the recommendations of the Government, but nevertheless, denied defendant's motion to reduce sentence.

The Court of Appeals found guidance for its decision in the *Santobello case, supra,* which involved, like the *Ewing* case, an apparent inadvertent breach of the Government's promise, as in both cases a second and different prosecutor appeared at the contested sentencing hearing. The *Ewing* court held, as this Court held in *Santobello,* that it was immaterial whether the violation of the Prosecution's promises was intentional or unintentional. It should be noted that in the instant case, the same Prosecutor appeared at Petitioner's guilty plea, original sentencing, and Rule 35 hearing. In *Ewing,* the court found that the breach having occurred at the hearing on Ewing's Rule 35 motion as opposed to the initial sentencing hearing was of little distinction as:

> "Both of these proceedings were integral parts of the sentencing process in this case. Surely when Ewing obtained the Government's promise not to oppose probation in exchange for his plea of guilty, he did so in the expectation that the benefits of that promise would be available throughout the proceedings relevant to the determination of his sentence. The Government was obligated to fulfill its commitment at least until the question of the Ewing sentence was finally resolved by the sentencing judge." at 1143.

The remedy that the *Ewing* court found appropriate was that since the Government breached its promise at the sentence reduction hearing, Ewing was not entitled to have his plea set aside but should be given the opportunity to

have the same motion for reduction of sentence submitted to a different Judge before whom the Government would be precluded from opposing probation.

The circuits that have declined to follow *Ewing* have found distinguishing facts so as to not find a breach of a plea agreement at a Rule 35 motion. In *Bergman* v. *Lefkowitz*, 569 F.2d 705 (CA 2 1977), and *United States* v. *Mooney*, 654 F.2d 482 (CA 7 1981), the Second and Seventh Circuits, respectively, found that the plea agreement did not breach the Rule 35 motion as there was no explicit promise in the plea agreement not to oppose a Rule 35 motion to reduce sentence. In *United States* v. *Ligori*, 658 F.2d 130 (CA 3 1981), the Third Circuit found that the plea agreement covered only the original sentencing as the Government as part of the agreement reserved the right to correct any factual inaccuracies contained in the presentence report or that might be made at allocution.

The Fifth Circuit itself found *Ewing* distinguishable in *United States* v. *Johnson* 582 F.2d 335 (CA 5 1978), where the court found that the Government did not breach its bargain not to make a sentence recommendation when, at a Rule 35 hearing, it responded to misinformation concerning the availibility of treatment at various federal correctional facilities submitted by the defendant. The Ninth Circuit in *United States* v. *Arnett*, 628 F.2d 1162 (CA 9 1979), appears to reputiate the law of *Ewing* but then went on to remand the case to the district court for a resolution as to what was actually the terms of a plea bargain where the Government had promised to "take no position as to the appropriate sentence".

The Sixth Circuit in the instant case found that the Government kept its bargain when it agreed to "take no position regarding the sentence to be imposed" as there was no evidence that the Government agreed not to comment at any post-sentence proceeding. Of course, there is no evidence contrariwise that the Government agreed that it

could comment at any post-sentence proceedings. It appears to be inimical to due process in criminal jurisprudence to allow a plea agreement to stand by what was not said.

An analysis of the foregoing cases reflects that the lower courts decisions and attitudes towards this important question of federal law are in a state of conflict and uncertainty. As plea agreements and their ramifications come in to play countless times every day in the Federal system, the question presented for review in this Petition is one of great importance to federal criminal jurisprudence.

Moreover, the instant case is an appropriate case for this Court's analysis of this important question of federal law. In the instant case, the same Prosecutor appeared at Petitioner's plea, sentence and sentence reduction motion. A plea agreement was explicitly stated on the record at Petitioner's plea and was reiterated at Petitioner's sentencing. Lastly, the Prosecutor's comments in opposition to a sentence reduction went squarely to the merits of the sentence, and not any collateral matters or misinformation presented by Petitioner. It is also noteworthy that the sentencing Judge in denying the sentence reduction request stated that the Prosecutor's comments had great merit. It thus appears, that the instant case is a clean and appropriate case to resolve this important issue of federal criminal jurisprudence that arises daily in every district of the federal judiciary.

Respectfully submitted,

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